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Minding the Empagran Gap

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MINDING THE *EMPAGRAN* GAP

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The Supreme Court has made clear how it expects courts to analyze the presumption against extraterritoriality as applied to federal statutes.¹ Through a two-step framework first articulated in *Morrison v. National Australian Bank*,² judges at step one look for a “clear indication” of congressional intent that the statute applies extraterritorially.³ If no such intent is found (meaning the presumption is not rebutted), at step two the judge asks “whether the case involves a domestic application of the statute.”⁴ Answering that question requires identifying the statute’s “focus” and then determining whether the case’s connections to the United States match that focus.⁵ This two-step inquiry has generated substantial commentary, much of it critical. But what if, at step one, the presumption *is* rebutted? How far do extraterritorial statutes reach?

On this question the Supreme Court has not provided similarly clear guidance.⁶ The closest the Court has come to an answer is *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, in which the Court explained that it “ordinarily construes ambiguous statutes to avoid *unreasonable interference* with the sovereign authority of other

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1. For a recent summary of the framework for analyzing the presumption against extraterritoriality, see *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018).

2. 561 U.S. 247 (2010).

3. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); see also *Morrison*, 561 U.S. at 255.

4. *RJR Nabisco*, 16 S. Ct. at 2101; see also *Morrison*, 561 U.S. 566-67 n. 9.

5. See *Morrison*, 561 U.S. at 266.

6. See *RJR Nabisco*, 136 S. Ct. at 2101 (acknowledging that *Morrison* left this question unaddressed).

nations.”⁷ The Court was perhaps purposefully vague, however, when it came to what “unreasonable interference” might mean, even as it rejected “case by case” abstention as “too complex to prove workable.”⁸ Nor have the lower courts settled on an answer. Reflecting this uncertainty, the new *Restatement (Fourth) of the Foreign Relations Law of the United States* acknowledges in section 405 that there may be a limit on the reach of an extraterritorial statute without settling on how that limit should be determined (beyond categorizing it as an act of statutory interpretation).⁹

This essay explores the *Empagran* “gap” in the Court’s—and thus the *Restatement (Fourth)*’s—treatment of extraterritorial federal statutes. It argues that the *Restatement (Fourth)*’s collection of statutory interpretation tools is insufficient to address fully the reach of extraterritorial federal statutes. Further, the current indeterminacy of this analysis carries costs in terms of possible doctrinal distortion. What the gap calls for is a conflicts of law analysis focused on the question of priority, which is effectively what the lower courts have been doing. But explicitly adopting a conflicts of law approach raises its own challenges, ones that are potentially surmountable but will require significant work. The essay thus concludes on an imperfect but pragmatic note, mirroring the *Restatement (Fourth)*’s embrace of constructive ambiguity to suggest how the gap might be narrowed, even if not completely resolved.

I. THE EMPAGRAN GAP

The new *Restatement (Fourth)* treats prescriptive comity purely as a matter of statutory interpretation.¹⁰ In particular, it collects a series of interpretive tools for identifying the geographic scope of federal statutes. First, the presumption against extraterritoriality limits the application of federal statutes to U.S. territory “unless there is a clear indication of congressional intent to the contrary.”¹¹ Second, if there is

7. 542 U.S. 155, 164 (2004) (emphasis added).

8. *Id.* at 168.

9. *See infra* note 19.

10. *See, e.g.*, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) & cmt. 1 & rep. n.12 (AM. LAW INST. 2018); *see also* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT’L L. 381, 395-96 (2017).

11. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

such a clear indication, the outer reach of the statute is circumscribed by the *Charming Betsy*¹² canon, under which judges presume that Congress did not mean to extend U.S. prescriptive jurisdiction beyond the bases recognized by international law (at least absent clear language to the contrary).¹³ In practice, however, *Charming Betsy* does not provide much of a limit as the bases of prescriptive jurisdiction under international law are extremely permissive.¹⁴ Third, if the statute so construed conflicts directly with a foreign statute, such that a person acting in good faith to avoid the conflict is nonetheless likely to be sanctioned by one country for obeying the laws of another, a judge may have discretion to excuse such a violation or reduce the sanctions applied.¹⁵ However, according to the *Restatement (Fourth)*, that discretion is derived from statutory text;¹⁶ it is not a free-standing defense created by either federal or international law.¹⁷

These tools of statutory interpretation still allow significant space for concurrent jurisdiction, or circumstances in which a dispute covered by a U.S. statute will also fall under the jurisdiction of another country. Often concurrent jurisdiction is not a problem. But in some cases, the exercise of U.S. jurisdiction may create friction with other countries whose jurisdiction is also implicated. Other times, the dispute may seem too far removed from U.S. interests to have merited congressional attention; the “literal catholicity” of some statutes, to adopt Justice Jackson’s phrase, requires some limiting principle.¹⁸ This is what *Empagran*’s “unreasonable interference” consideration attempts to provide. The *Restatement (Fourth)* has generalized *Empagran* into a “principle of statutory interpretation” that allows U.S. courts to “interpret federal statutory provisions to include other limitations on their applicability” beyond the presumption against extraterritoriality.¹⁹

12. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

13. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 406.

14. *But see* William S. Dodge, *Reasonableness in the Restatement (Fourth) of Foreign Relations Law*, 55 WILLAMETTE L. REV. (forthcoming Jan. 2020) (stressing the requirement under international law of a reasonable link to justify the exercise of prescriptive jurisdiction).

15. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442.

16. *Id.* § 442 cmt. d (“Each regulatory regime must be assessed based on its particular attributes, and in particular based on the text, structure, and history of the law in question.”).

17. *See id.* § 442 cmt. a.

18. *Lauritzen v. Larsen*, 345 U.S. 571, 576 (1953).

19. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 (“As a matter of prescriptive comity, courts in the United States may interpret federal

Relying on *Empagran* and the new section 405 to manage concurrent jurisdiction as a matter of statutory interpretation, however, introduces two complications. First, the idea of “unreasonable interference” is underdefined. As the *Restatement (Fourth)* acknowledges, the lower courts have by necessity developed additional analytical frameworks to implement this general directive, but those frameworks vary by circuit and by statute.²⁰ Thus, section 405 is worded even more generally than *Empagran*, simply recognizing the possibility of “other limitations” on federal statutes’ applicability.

A saving grace is the *Restatement (Fourth)*’s acknowledgment that administrative agencies may step in to fill this gap by providing interpretations of the geographic scope of federal statutes.²¹ These agency interpretations, which would merit *Chevron* deference, may better reflect the legitimate sovereign interests of other states based in part on agency coordination with foreign peers.²² But for statutes for which federal agencies have not adopted such a limiting construction, the challenge of implementing *Empagran* and section 405’s broad mandate remains.

Second, and more fundamentally, there is a mismatch between the generality of statutory interpretation and the context-specific nature of an “unreasonable interference” inquiry. Determining what counts as “unreasonable interference” with the interests of other states would seem to call for identifying and weighing those foreign interests. But the interests of other states are not interchangeable. Treating “unreasonable interference” as a matter of statutory interpretation, then, risks elevating and locking in the interests of some states over the (potentially contrary) interests of other states.²³ Or put another way, it is difficult at the wholesale level required by statutory interpretation to figure out what will count as “unreasonable interference” with other

statutory provisions to include other limitations on their applicability.”); *see also id.* cmt. a (linking § 405 to *Empagran* and noting that “[r]easonableness is a principle of statutory interpretation . . . It operates in conjunction with other principles of statutory interpretation.”).

20. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 rep. n.4 (collecting cases).

21. *Id.* § 405 rep. n.1.

22. *See* William S. Dodge, *Chevron Deference and Extraterritorial Regulation*, 95 N.C. L. Rev. 911, 944-48 (2017).

23. *See* Ralf Michaels, *Empagran’s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 533 (David Sloss et al. eds., 2011) (critiquing *Empagran* for elevating the interests of foreign state *amici* over the interests of the foreign states actually affected by the challenged conduct).

states' interests, or whose "legitimate sovereign interests" are at stake.

These challenges of uncertainty and generality may be encouraging judges to avoid the question of extraterritorial reach altogether, avoidance that can in turn distort other inquiries. One option for avoiding the *Empagran* gap is to rely more heavily on doctrines of adjudicatory comity, which allow judges to voluntarily decline their jurisdiction on the belief that foreign courts are better suited to resolve a particular dispute. I have elsewhere explained my concerns, however, about overreliance on doctrines like *forum non conveniens* and international comity abstention.²⁴ Because these doctrines involve declining to exercise congressionally granted jurisdiction, they should be used sparingly and as a last resort. But the broad framing of such inquiries (in conjunction with the *Empagran* gap) instead invites their over-application.²⁵

Another option for avoiding the gap is to lean more heavily on the presumption against extraterritoriality.²⁶ This extra reliance on the presumption can take two different forms, both of which are problematic. First, courts might apply *Morrison* step one vigorously to interpret a federal statute as not applying extraterritorially. This is arguably what the Supreme Court itself did in *RJR Nabisco v. European Community*,²⁷ when it acknowledged that RICO's substantive provisions apply extraterritorially but avoided having to articulate limits to that extraterritorial reach by instead re-applying the presumption against extraterritoriality separately to RICO's provision for civil remedies (and concluding that the remedial provision did *not* rebut the presumption).²⁸

Second, courts might skip directly to *Morrison* step two and assert that regardless of potential geographic scope, the application of the

24. See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017); Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019).

25. See generally Gardner, *Abstention at the Border*, *supra* note 24 (developing this argument).

26. See Hannah L. Buxbaum, *Extraterritoriality in the Public and Private Enforcement of U.S. Regulatory Law*, in THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND ITS CHALLENGES (Franco Ferrari & Diego P. Fernandez Arroyo eds., forthcoming Dec. 2019); Maggie Gardner, *RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134 (2016).

27. 136 S. Ct. 2090 (2016).

28. For further development of this analysis, including a critique of the majority's interpretation of that remedial provision, see Gardner, *RJR Nabisco and the Runaway Canon*, *supra* note 26. A similar argument could be made regarding the Court's application of the presumption in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

statute in the present case would be domestic. In *WesternGeco LLC v. ION Geophysical Corp.*,²⁹ for example, the Court avoided a difficult question about the potentially global reach of U.S. patent remedies by jumping to step two and concluding that the infringement at issue was a domestic act.³⁰ This move is pragmatic in the short run, but it puts greater weight on the “focus” inquiry in the long run—an inquiry that is already showing signs of strain. As Professor Aaron Simowitz has argued, identifying the “focus” of a statute may sound objective, but it is a formalism that like all formalisms devolves into malleable decisions: How broadly or narrowly should the focus be defined? Can a statute have more than one “focus”? What if the focus is intangible and thus not located in any physical space?³¹

In addition to these practical problems, both avoidance moves—the turn to adjudicatory comity to decline congressionally granted jurisdiction and the application of formalistic fictions to constrain federal statutes—also make it harder for Congress, when it *does* want particular laws to apply to persons or conduct outside of U.S. territory, to effectuate that intent. The Supreme Court’s recent decisions have ratcheted up how much Congress must say and how clearly it must say it before its laws will be allowed to have extraterritorial effect.³² And even if Congress does speak with surpassing clarity, the federal courts may nonetheless assert the power to decline to hear those disputes as a matter of judicial discretion.³³

At the very least, it seems unlikely that section 405 will *reduce* federal courts’ reliance on the presumption against extraterritoriality. To the contrary, the vagueness of section 405 makes it more likely that judicial reliance on the presumption against extraterritoriality will continue to expand. As a result, and despite the reporters’ admonishment to not “double-count” foreign state interests in this way,³⁴ section 405 may become the proverbial second bite at the apple for judges and litigants seeking to end troublesome cases.

29. 138 S. Ct. 2129 (2018).

30. *Id.* at 2136, 2138.

31. See Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. ____ (forthcoming 2019) (raising these and similar questions).

32. See, e.g., Gardner, *RJR Nabisco and the Runaway Canon*, *supra* note 26, at 141-43.

33. See Gardner, *Abstention at the Border*, *supra* note 25, at 81-90.

34. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 cmt. c (AM. LAW INST. 2018).

II. THE IRREPRESSIBLE RELEVANCE OF CONFLICTS OF LAW

Lurking behind the *Empagran* gap is a long-running debate over the role of conflicts of law in the application of extraterritorial federal statutes.³⁵ To borrow the framing of the draft *Restatement (Third) of Conflicts of Laws*, the *Empagran* gap represents the pivot point between the question of scope and the question of priority. The first question asks which states' laws apply to the given conduct ("scope"), while the second asks which of those laws should take precedence ("priority").³⁶ The draft *Restatement (Third)* proposes that the question of scope can properly be thought of as a matter of statutory interpretation.³⁷ That matches the approach of the *Restatement (Fourth) of the Foreign Relations Law of the United States* regarding questions of prescriptive comity. The *Restatement (Fourth)* self-consciously frames those questions as limited to tools of statutory interpretation and as focused on the "geographic scope" of federal laws.

But the question of "unreasonable interference" with the interests of other nations starts to feel like a question of priority—of when U.S. law should give way to the regulatory authority of other sovereigns. Indeed, *Empagran*'s "unreasonable interference" principle was adapted from conflicts of law analysis. In articulating this principle, *Empagran* cited to admiralty cases like *Lauritzen v. Larsen* that framed their analysis in terms of conflicts of law.³⁸ It also cited to section 403 of *The Restatement (Third) of the Foreign Relations Law of the United States*,³⁹ which proposed that states "may not exercise jurisdiction to prescribe law . . . when the exercise of such jurisdiction is unreasonable."⁴⁰ Although section 403 categorized "unreasonableness" as a question of jurisdictional scope, its multifactor balancing test reflected the balancing tests developed by the appellate courts in cases

35. See, e.g., William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 103-04 & nn.12-13 (1998) (collecting authorities on both sides of this debate).

36. See RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 5, topic 1 introductory note (p.111) (Council Draft No. 2, Sept. 10, 2017). This view is still controversial, but the distinction is helpful for present purposes.

37. *Id.* at 113; see also *id.* § 5.01 cmt. c.

38. See *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); and *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953)).

39. *Id.*

40. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (AM. LAW INST. 1987).

like *Timberlane Lumber Co. v. Bank of America*.⁴¹ *Timberlane*'s factors, in turn, were also drawn from conflicts of law considerations, including the “[b]alancing of foreign interests” involved in *Lauritzen*.⁴² Even while *Empagran* rejected the case-by-case balancing of conflicts of law analysis, then, its guidance (such as it was) was derived from conflicts of law inquiries.

Nor is *Empagran* the only time the Court has transformed conflicts of law considerations into tools of statutory interpretation. The modern presumption against extraterritoriality is itself rooted in conflicts of law. Multiple scholars have traced how the presumption against extraterritoriality initially reflected Beale-ian conceptions of strict territoriality during the era of the *Restatement (First) of Conflicts of Law*.⁴³ Following the choice-of-law revolution, which acknowledged state interests in regulating extraterritorial conduct and thus interred a territorially-limited conception of choice of law, the presumption against extraterritoriality fell out of use. When it was resurrected by *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*,⁴⁴ the Supreme Court combined the “old” presumption (“whereby *unexpressed* congressional intent may be ascertained”⁴⁵) with language from admiralty cases like *Lauritzen* that had addressed conflicts of law considerations more forthrightly. Thus, *Aramco* required an “affirmative intention of the Congress *clearly expressed*” before a statute could be construed to apply extraterritorially,⁴⁶ a conflation of doctrines that has justified the subsequent evolution of the presumption against extraterritoriality towards a clear statement rule.⁴⁷

This pattern of transforming conflicts of law questions into questions of statutory interpretation may reflect the uneasy status of conflicts of law for federal statutes, as Caleb Nelson has suggested.⁴⁸

41. 549 F.2d 597 (9th Cir. 1976).

42. *See id.* at 613.

43. *See, e.g.,* Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 660–61 (2013); *see also id.* at 661 n. 13 (collecting other scholars to similar effect).

44. 499 U.S. 244 (1991).

45. *See* EEOC v. Arabian Am. Oil Co. (*ARAMCO*), 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (emphasis added)).

46. *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)) (emphasis added).

47. *See* Gardner, *RJR Nabisco and the Runaway Canon*, *supra* note 25, at 136–37 (developing this argument).

48. *See* Nelson, *supra* note 43.

Articulating a federal doctrine for conflicts of law would require grappling with difficult *Erie* questions⁴⁹ and creating federal common law, both of which make judges uneasy. Nelson thus argues that locating choice-of-law inquiries within individual federal statutes (*i.e.*, by transforming them into tools of statutory interpretation) has allowed federal judges to disclaim judicial lawmaking power while ensuring that such determinations remain matters of federal law.⁵⁰

Beyond this concern for federal judicial lawmaking, the Supreme Court has expressed concern about the unpredictability of balancing tests like those proposed by section 403 and *Timberlane*.⁵¹ This concern is in part a question of institutional capacity: are judges capable of identifying and weighing the interests of different governments? I have myself expressed doubts as to which factors in such balancing tests judges can reliably ascertain.⁵² There is also an imperfect fit between conflicts of law analysis, which is designed for disputes between private litigants, and the public law nature of most federal statutes that apply extraterritorially.⁵³ In the private law realm, choice of law analysis is used to identify the one “right” law to apply to a dispute; in the public law realm, in contrast, concurrent jurisdiction means that more than one sovereign’s law may legitimately be applicable.

For all these reasons, adopting an explicit conflicts of laws framework for analyzing the *Empagran* gap may not be an ideal solution. But neither is pretending that the consideration of foreign sovereign interests can be addressed at the level of generality required by statutory interpretation—or avoiding the problem altogether through vaguely defined exercises of abstention.

III. IMPERFECT OPTIONS

In the absence of clearer guidance, the courts of appeal have been

49. In particular, the Supreme Court has long held that state law applies to conflicts of law questions when federal courts are applying state substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *see also Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (applying *Klaxon* to a case applying state law to foreign conduct).

50. *See Nelson, supra* note 43, at 662-63, 727.

51. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004).

52. *See, e.g., Maggie Gardner, Parochial Procedure*, 69 STAN. L. REV. 941, 1006-09 (2017).

53. I thank Jim Nafziger and Bill Dodge for pointing out this problem of mismatch between private and public law frameworks. *See also Dodge, Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism, supra* note 35 (comparing unilateral and multilateral approaches to choice of law for public laws).

using both statutory interpretation and abstention to address the *Empagran* gap. In the context of antitrust claims, for example, the Second Circuit has framed the question as one of abstention, but has invoked the balancing tests of *Timberlane* and *Mannington Mills, Inc. v. Congoleum Corp.*⁵⁴ to analyze it.⁵⁵ In addressing Lanham Act claims, meanwhile, the Ninth Circuit has framed the question as one of statutory interpretation, though it also analyzed the question through *Timberlane*'s balancing test.⁵⁶ And some federal courts have more forthrightly invoked federal common law to resolve conflicts of law questions in transnational cases, especially when those cases involve federal questions.⁵⁷ Indeed, the lower courts continue to invoke *Timberlane* and section 403 factors to address the *Empagran* gap, regardless of how the inquiry is framed in doctrinal terms.⁵⁸

For its part, the *Restatement (Fourth)* clearly rejects abstention and embraces statutory interpretation as the right doctrinal home for this inquiry.⁵⁹ But in doing so, it eschews a balancing test approach. This effectively ends the analysis for federal statutes with the question of scope: if a claim falls within the scope of the statute, then the statute should be applied. While this approach solves the analytical messiness of bringing conflicts analysis in through the backdoor, it is itself a rule of priority in the form of a unilateral approach to conflicts.⁶⁰ That choice of priority rule should be identified and defended as such because of the signal it sends to judges. The current signal being sent is precisely the opposite: that judges should be wary of applying

54. 595 F.2d 1287 (3d Cir. 1979).

55. See *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.* (*In re Vitamin C Antitrust Litig.*) 837 F.3d 175, 184 (2d Cir. 2016), *rev'd on other grounds sub nom.*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018).

56. See *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 969, 972-75 (9th Cir. 2016).

57. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 794-95 (5th ed. 2011) (gathering cases).

58. See also *French v. Liebmann* (*In re French*) 440 F.3d 145, 153 (4th Cir. 2006) (applying § 403 to determine whether “the application of foreign law may be more appropriate than the application of our own law” in the context of bankruptcy).

59. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 cmt. a (AM. LAW INST. 2018) (“Reasonableness is a principle of statutory interpretation and not a discretionary judicial authority to decline to apply federal law. It operates in conjunction with other principles of statutory interpretation. When the intent of Congress to apply a particular provision is clear, a court must apply that provision even if doing so would interfere with the sovereign authority of other states.”).

60. Cf. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, *supra* note 35, at 104 (noting that “the central question” is not “whether conflicts theory should be applied to questions of extraterritoriality, but rather which conflicts theory should be applied” and arguing for a unilateral approach).

statutes extraterritorially.⁶¹ Explicitly identifying and justifying a unilateral rule of priority would reassure federal judges that extraterritorial statutes should indeed be applied extraterritorially.

One option would thus be to follow the *Restatement (Fourth)*'s lead to its logical end by articulating a rule of priority that does not defer to other states' interests and thus does not require a balancing test. The difficulty with this approach is that it will necessitate some abstention, given that judges will not always be comfortable applying extraterritorial statutes so broadly. For example, federal judges might invoke abstention to defer to parallel proceedings in other countries or to executive branch intervention.⁶² But to prevent the exceptions from swallowing the rule, the grounds for abstention must be carefully cabined.

Another option would be to embrace a limited federal common law of conflicts of law, at least for transnational cases involving federal questions.⁶³ The analysis need not be open-ended balancing (as in *Lauritzen*). Instead it might start with a strong default in favor of applying extraterritorial federal statutes extraterritorially. Factors currently used in balancing tests like *Timberlane* and section 403 might then be simplified and refined. Fewer factors and factors focused on judicially ascertainable facts will be easier to assess and thus result in more predictable outcomes.⁶⁴ To take a few examples, the *Timberlane* factor of the "nationality of parties and location of businesses" is both relatively easy to ascertain and bears directly on the strength of U.S. interest in the dispute. The "degree of conflict with foreign law," in contrast, is harder to apply and overlaps with other comity-based doctrines like act of state and foreign compulsion defenses (indeed, this factor is in some tension with the Supreme Court's holding in *Hartford Fire Insurance Co. v. California*⁶⁵). The Ninth Circuit has recently suggested that the "degree of conflict with foreign law" actually relates to whether there is an ongoing proceeding abroad,⁶⁶ but that

61. See for example the discussion of *RJR Nabisco* and *WesternGeco* above.

62. See Gardner, *Abstention at the Border*, *supra* note 25, at 110-25 (outlining possible grounds for abstention in transnational cases, though stressing the need to cabin these grounds carefully and expressing some doubt as to the feasibility of abstention based on executive branch deference).

63. See BORN & RUTLEDGE, *supra* note 57, at 794 (gathering authorities exploring this possibility).

64. See Gardner, *Parochial Procedure*, *supra* note 52, at 1006-09 (discussing how to design decision-making frameworks when complex systemic interests are at stake).

65. 509 U.S. 764 (1993).

66. See *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 973 (9th Cir. 2016).

consideration is better addressed through a comity-based doctrine keyed more explicitly to foreign parallel proceedings.⁶⁷ The impulse behind this factor, in other words, might be better served through other tools. More generally, the retained factors should focus on the significance of U.S. interests rather than a comparison across jurisdictions: if there is more than a tenuous connection to the United States, the court should hew to the strong presumption that an extraterritorial law should apply extraterritorially.

Adopting a conflicts of law approach to the *Empagran* gap would have the benefit of matching judicial intuition as to what sort of analysis the gap requires. It is also more sensitive to context (as compared to statutory interpretation), which could reduce the impetus for judges to resort to backdoor functionalism. But under either approach—statutory interpretation paired with limited abstention or a simplified conflicts of law analysis—the solution should embrace some imprecision at the margin. If the analysis allows a few too many (or a few too few) cases to go forward in U.S. courts, that over- or under-inclusion may be a small and acceptable cost to pay for the consistency and ease of application gained by adopting a more rule-like approach to the *Empagran* gap. The stakes for any one case, in other words, are not so high as to make precise calibration a requirement.⁶⁸

Regardless of the label applied by courts or the *Restatement*, the *Empagran* gap reflects a question of conflicts of law that is in search of a sensible analytical home. Confronting the issue of priority directly—whether through statutory interpretation or a conflicts of law framework—may make judicial analysis of the *Empagran* gap more consistent, more attuned to motivating principles, and less prone to empty formalisms.

67. The federal courts currently analyze this question sometimes via *forum non conveniens* and sometimes under the label of international comity abstention. I have argued that it merits its own explicit and carefully formulated abstention-like doctrine. See Gardner, *Abstention at the Border*, *supra* note 25, at 116-20.

68. Cf. Gardner, *Retiring Forum Non Conveniens*, *supra* note 24, at 427-29 (analyzing the trade-off between simpler decision-making rubrics, on the one hand, and precise jurisdictional calibration, on the other).